A

LOW TIN YONG v. LOW YONG THUAN

COURT OF APPEAL, PUTRAJAYA
ALIZATUL KHAIR OSMAN JCA
ABANG ISKANDAR JCA
NALLINI PATHMANATHAN JCA

B

[CIVIL APPEAL NO: B-02(NCVC)(W)-1854-11-2014]
2 MARCH 2016

C

TRUSTS: *Land – Declaration of trust – Deceased mother transferred land to registered owner for his contribution to growth of family business – Whether registered owner held land on trust for all siblings – Whether land to be distributed equally – Whether trust existed – Whether alleged trust registered – Whether there was written document or trust deed to support existence of trust – National Land Code, s. 344*

D

LAND LAW: *Transfer – Trust – Laches – Deceased mother transferred land to registered owner for his contribution to growth of family business – Whether registered owner held land on trust for all siblings – Inordinate delay in instituting claim – Whether claim defeated by laches*

E

The parties are brothers and their parents have both passed away. In 1955, their late father ('the father') commenced a sundry shop business where the appellant worked without receiving any salary. Using the money from the sundry shop, the father purchased properties in his late wife's ('the mother') name, which included a piece of land. In 1963, the mother transferred the land to the appellant as he did not receive any salary for five years of work at the sundry shop. The parents later died without leaving a will. In 2013, the respondent filed an action against the appellant at the High Court, seeking, *inter alia*, (i) a declaration that the appellant held the land on trust for all the siblings; and (ii) an order that the appellant return and transfer the land in 1/7 portions to each siblings or in the case where the sibling is deceased, to the estate of each deceased. During trial, the appellant and his sister ('DW2') testified that their mother distributed her estate or assets during her lifetime. However, on the basis of the existence of a suit in the High Court where the respondent and his siblings sought the transfer of two pieces of land that had been transferred to DW2 while the mother was seriously ill and unconscious, the trial judge rejected the appellant and DW2 as credible witnesses and concluded that their testimonies were incorrect. After a full trial, the trial judge opined that the land was held by the appellant on trust for the rest of his siblings. Hence, the present appeal. The appellant contended that the trial judge (i) misconstrued or failed to properly/reasonably evaluate the evidence before her which resulted in erroneous findings of fact; (ii) failed to appreciate sufficiently or at all the issue of laches in relation to the claim of the existence of a trust; and (iii) misdirected herself on the law in relation to whether the requisite elements required for the

F

G

H

I

subsistence of a trust did in fact exist on the factual matrix of this case, as well as the burden/standard of proof to be applied when determining whether trust subsists. A

Held (allowing appeal)
Per Nallini Pathmanathan JCA delivering the judgment of the court: B

(1) The finding of the trial judge that the appellant and DW2 were untruthful witnesses was premised on a clearly erroneous comprehension of basic facts of the case. The trial judge failed to comprehend the fact that the mother had distributed all her assets in her lifetime. The fact that the respondent and the other siblings were contesting the transfer of the land by the mother to individual siblings did not detract from the fact that the mother had effected these transfers during her lifetime, leaving nothing to be distributed upon her death. The challenge mounted by the respondent and the other siblings did not mean that there was no distribution of the mother's estate. On the contrary, it was these very transfers that established that there was a complete distribution of the mother's estate. (para 48) C D

(2) With the wrongful rejection of the appellant and DW2's evidence *in toto*, the trial judge failed to evaluate properly or at all the relevant weight to be accorded to their evidence in relation to the history of the purchase of the land and the mother's intention to give the land to the appellant for his contribution to the growth of the sundry shop business. (para 48) E

(3) The father passed away in an accident without a will and his estate was distributed in accordance with the provisions of the Distribution Act 1958. As such, it could not be concluded that the father had distributed his property between his children equally. The inference that the parents wished to divide their property equally between the siblings was also not made out. (para 48) F

(4) The trial judge misdirected herself on the standard of proof to be applied when determining whether or not a trust subsisted on the given factual matrix. The trial judge applied the standard of a 'balance of probabilities' rather than 'beyond reasonable doubt'. In doing so, Her Ladyship erred in law. Even if the lower standard was applied, the threshold was not met to warrant an inference that a trust subsisted on a consideration of the totality of the evidence. If the evidence as a whole had been evaluated fully and cumulatively, the only result that would ensue would be that no such trust subsisted in favour of the siblings as a whole. (paras 49-50) G H

(5) There was nothing on the title or the memorandum of transfer to bear out the existence of such a trust. Section 344 of the National Land Code provides for the registration of any trust created in the memorial of registration. In short, the title did not reflect that the appellant held the I

land on trust. Furthermore, there was no written document or trust deed to support the existence of a trust. The indefeasibility of title enjoyed by the appellant ought not to be undermined by the mere suggestion of an existence of a trust, some 50 years later. If indeed the land was for the benefit of the siblings and held on trust, there would have been no necessity to transfer the land to the appellant as the mother could have held it on trust for all her children. (paras 51, 52 & 57)

(6) The trial judge failed to consider that there was an inordinate delay under the doctrine of laches in the institution of this claim. Given the delay of 50 years during which the respondent and the siblings did nothing to assert their alleged interest in the land, this was a fit and proper case for the trial judge to conclude that laches defeated the respondent's claim. (paras 63 & 66)

Bahasa Malaysia *Headnotes*

Pihak-pihak adalah adik beradik dan ibu bapa mereka telah meninggal dunia. Pada 1955, mendiang bapa mereka ('si bapa') memulakan perniagaan kedai runcit di mana perayu bekerja tidak bergaji. Menggunakan wang daripada kedai runcit itu, si bapa membeli hartanah di bawah nama mendiang isterinya ('si ibu'), termasuk sebidang tanah. Pada 1963, si ibu memindah milik tanah tersebut kepada perayu kerana dia tidak menerima apa-apa gaji sepanjang bekerja di kedai runcit selama lima tahun. Si ibu dan si bapa meninggal dunia tidak berwasiat. Pada 2013, responden memfailkan satu tindakan terhadap perayu di Mahkamah Tinggi, memohon, antara lain (i) pengisytiharan bahawa perayu memegang tanah tersebut sebagai amanah bagi semua adik beradik; dan (ii) satu perintah agar perayu memulangkan dan memindah milik tanah dengan pembahagian 1/7 kepada setiap adik beradik atau jika mereka sudah meninggal dunia, kepada harta pusaka setiap si mati. Semasa perbicaraan, perayu dan saudara perempuannya ('DW2') memberi keterangan bahawa ibu mereka membahagikan aset atau harta pusaka semasa hayatnya. Walau bagaimanapun, akibat kewujudan guaman di Mahkamah Tinggi di mana responden dan adik beradiknya memohon pindah milik dua bidang tanah yang telah dipindah milik kepada DW2 semasa mendiang sakit teruk dan tidak sedarkan diri, hakim bicara menolak kredibiliti perayu dan DW2 sebagai saksi dan memutuskan bahawa keterangan mereka tidak betul. Selepas perbicaraan penuh, hakim bicara berpendapat bahawa tanah tersebut dipegang oleh perayu sebagai amanah bagi semua adik beradik. Oleh itu, timbul rayuan ini. Perayu menghujahkan bahawa hakim bicara (i) tersalah tafsir atau gagal mempertimbangkan keterangan yang dikemukakan dengan betul/munasabah, mengakibatkan kekhilafan dapatan fakta; (ii) gagal mempertimbangkan secukupnya atau sama sekali isu kelengahan tuntutan wujudnya amanah; dan (iii) tersalah arah diri beliau berkenaan sama ada elemen-elemen yang diperlukan bagi kewujudan amanah sebenarnya wujud berdasarkan fakta matrik kes ini, dan juga beban/standard pembuktian yang terguna pakai dalam memutuskan sama ada wujud amanah.

Diputuskan (membenarkan rayuan)
Oleh Nallini Pathmanathan HMR menyampaikan penghakiman mahkamah:

(1) Dapatan hakim bicara bahawa perayu dan DW2 adalah saksi yang tidak jujur berasaskan pemahaman fakta asas kes yang jelas khilaf. Hakim bicara gagal memahami fakta bahawa si ibu telah membahagikan semua aset semasa hayatnya. Fakta bahawa responden dan adik beradik lain mempertikaikan pindah milik tanah oleh si ibu kepada adik beradik secara individu tidak menjejaskan fakta bahawa si ibu telah melakukan pindah milik semasa hayatnya, tanpa meninggalkan apa-apa lagi untuk dibahagikan selepas kematiannya. Cabaran yang dikemukakan oleh responden dan adik beradik lain tidak bermaksud tiada pembahagian harta pusaka si ibu. Sebaliknya, semua pindah milik ini membuktikan bahawa berlaku pembahagian lengkap harta pusaka si ibu.

(2) Akibat penolakan penuh keterangan perayu dan DW2, hakim bicara gagal menilai dengan betul atau sepenuhnya pemberatan relevan yang wajar diberikan pada keterangan berkenaan sejarah belian tanah dan niat si ibu untuk memberi tanah tersebut kepada perayu atas sumbangannya dalam perkembangan perniagaan kedai runcit.

(3) Si bapa meninggal dunia akibat kemalangan tanpa meninggalkan apa-apa wasiat dan harta pusakanya dibahagikan selaras dengan peruntukan Akta Pembahagian 1958. Dengan itu, tidak boleh disimpulkan bahawa si bapa telah membahagikan harta pusakanya dengan sama rata buat anak-anaknya. Kesimpulan bahawa si ibu dan si bapa berhajat membahagikan harta mereka secara sama rata tidak dibuktikan.

(4) Hakim bicara tersalah arah diri beliau berkenaan standard pembuktian yang terguna pakai dalam memutuskan sama ada amanah wujud atau tidak berdasarkan fakta matrik. Hakim bicara mengguna pakai standard 'atas imbangan kebarangkalian' dan bukan 'melampaui keraguan munasabah'. Dengan berbuat demikian, beliau terkhilaf di bawah undang-undang. Jika pun standard yang lebih rendah diguna pakai, nilai ambang tidak dipenuhi untuk mewajarkan kesimpulan bahawa wujud amanah, berdasarkan keseluruhan keterangan. Jika keseluruhan keterangan dinilai sepenuhnya dan secara kumulatif, keputusan yang dicapai adalah bahawa amanah buat semua adik beradik tidak wujud sama sekali.

(5) Tiada apa-apa dalam hak milik atau memorandum pindah milik yang menunjukkan kewujudan amanah sedemikian. Seksyen 344 Kanun Tanah Negara memperuntukkan pendaftaran apa-apa amanah yang dibuat dalam rekod pendaftaran. Ringkasnya, hak milik tidak mencerminkan bahawa perayu memegang tanah tersebut sebagai amanah. Tambahan lagi, tiada dokumen bertulis atau surat ikatan amanah untuk menyokong kewujudan amanah. Hak milik tidak boleh sangkal yang dinikmati oleh perayu tidak terjejas sekadar dengan

A cadangan bahawa wujudnya amanah, 50 tahun kemudian. Jika tanah tersebut sememangnya bagi manfaat semua adik beradik dan dipegang sebagai amanah, tanah tersebut tidak perlu dipindah milik kepada perayu kerana si ibu boleh memegangnya sendiri sebagai amanah buat semua anak-anaknya.

B **(6)** Hakim bicara gagal mempertimbangkan bahawa berlaku kelewatan melampau di bawah doktrin kelengahan dalam memulakan tuntutan ini. Berdasarkan kelewatan 50 tahun dalam mana responden dan adik beradiknya tidak melakukan apa-apa untuk menuntut kepentingan mereka dalam tanah tersebut, ini ialah kes yang betul dan sesuai bagi C hakim bicara memutuskan bahawa kelengahan melumpuhkan tuntutan responden.

Case(s) referred to:

Alfred Templeton & Ors v. Mount Pleasure Corp Sdn Bhd [1989] 1 CLJ 693; [1989] 1 CLJ (Rep) 219 HC ***(refd)***

D *Anderson v. City of Bessemer (1985) 470 US 564* ***(refd)***

Carlyle v. Royal Bank of Scotland Plc [2015] UKSC 13 ***(refd)***

Choong Kwee Sang v. Choong Kwee Keong [2008] 5 CLJ 229 CA ***(refd)***

Clarke v. Edinburgh and District Tramways Co Ltd [1919] SC (HL) 35 ***(refd)***

Conlay Construction Sdn Bhd v. Perembun (M) Sdn Bhd [2013] 9 CLJ 828 FC ***(refd)***

Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***

E *Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC* ***(refd)***

Hameeda Bee v. Mrs P Seenivasagam [1950] 1 LNS 22 HC ***(refd)***

Henderson v. Foxworth Investments Limited [2014] UKSC 41 ***(refd)***

Low Yong Thuan v. Low Mey Yoon & Ors & Another Appeal [2015] 1 LNS 271 HC ***(refd)***

F *McGraddie v. McGraddie And Another [2013] UKSC 58* ***(refd)***

Merita Merchant Bank Singapore Ltd v. Dewan Bahasa dan Pustaka [2014] 9 CLJ 1064 FC ***(refd)***

Po Kin & Anor v. Po Shein AIR [1926] PC 77 ***(refd)***

Thomas v. Thomas [1947] AC 484 ***(refd)***

Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC ***(refd)***

G *Tneu Beh v. Tanjong Kelapa Sawit Sdn Bhd & 3 Ors [1995] 1 CLJ 741 HC* ***(dist)***

Wan Naimah v. Wan Mohamad Nawawi [1972] 1 LNS 164 FC ***(refd)***

Yeong Ah Chee @ Yan Hon Wah v. Lee Chong Hai & Anor And 13 Other Appeals [1994] 3 CLJ 20 SC ***(refd)***

Yong Nyee Fan & Sons Sdn Bhd v. Kim Guan & Co Sdn Bhd [1978] 1 LNS 244 FC ***(refd)***

H *Yong Wee Ming v. Chin Thian Guan [1983] 2 CLJ 210; [1983] CLJ (Rep) 438 FC* ***(refd)***

Yuill v. Yuill [1945] P 15 ***(refd)***

Legislation referred to:

Limitation Act 1953, ss. 29, 32

National Land Code, s. 344

I *For the appellant - Felicia SH Ho (Jane Mary Pragasam with her); M/s Ho-Noecker & Pragasam*

For the respondent - Sanjay Mohan (HY Lee & Wong Li-Wei with him); M/s HY Lee & Co

[Editor's note: Appeal from High Court, Kuala Lumpur; Suit No: 22 NCVC-418-05-2013 (overruled)]

Reported by Najib Tamby

JUDGMENT

Nallini Pathmanathan JCA:

Introduction

[1] The appellant, Low Tin Yong @ Low Yong Lian, who was the defendant in the court below ('the appellant') appealed from the judgment of the High Court of Malaya at Shah Alam, allowing the claim by the respondent, Low Yong Thuan, the plaintiff in the court below ('the respondent'), for a declaration that a piece of land known as Grant No. 50645, Lot No. 7968, Mukim Kajang, Daerah Ulu Langat, Negeri Selangor ('the said land') and registered in the name of the appellant since 11 January 1963, is held on trust by him for the respondent and his six other siblings. The appellant and the respondent are brothers. Three of the other siblings have passed away.

[2] On appeal to this court, the appellant contends that the trial judge misdirected herself in that she misconstrued or failed to properly/reasonably evaluate the evidence before her, in relation to salient matters of fact. This resulted in findings of fact that were plainly wrong. It was further contended that the learned judge failed to appreciate sufficiently or at all the issue of laches in relation to the claim of the existence of a trust. Additionally, the learned trial judge misdirected herself on the law in relation to whether the requisite elements required for the subsistence of a trust did in fact exist on the factual matrix of this case, as well as the burden/standard of proof to be applied when determining whether a trust subsists. It was the appellant's assertion in this court that these cumulative errors of fact and law resulted in the incorrect determination that the appellant holds the said land on trust for the appellant and his other siblings.

[3] In this court, we concluded that the appeal should be allowed. We found on a consideration of the totality of the evidence that there was simply insufficient evidence to meet the threshold requirements for the existence of a trust, even applying the lower standard of proof of a balance of probabilities. The learned trial judge had, with respect, misdirected herself in fact and in law when she failed to appreciate that the essential elements for the creation of a trust, express or implied were not made out on the evidence before the court. We were satisfied that none of the features of an express or implied trust were evident on the evidential matrix of this case. Finally on the issue of laches, we agreed with learned counsel for the appellant that there was an inordinate delay in the institution of the suit, which had not been satisfactorily explained. We therefore set aside the decision of the learned trial judge and dismissed the respondent's claim.

[4] We append below the full reasons for our decision.

Salient Background Facts

[5] The parents of the appellant and respondent, namely Low Peng Hong ('the father') and Tan Kuan ('the mother') had seven children in total. Both the father and mother of the appellant and the respondent are now deceased.

[6] The father of the parties worked as a supervisor, more colloquially referred to as a 'kepala' at an estate in Pahang. On 1 August 1955, the father commenced a business as the proprietor of a sundry provision shop known as Chop Hock Bee ('the sundry shop'). The father was registered as the sole proprietor of this business.

[7] In the year 1958, the appellant turned 16 and began to work in the sundry shop. It is not in dispute that he did not receive a salary for his work there.

[8] The appellant's siblings, Low Yong Piew, Low Yong Pak @ Yong Pak and the respondent also helped out in the sundry shop.

[9] The father purchased properties in the mother's name using the money from the sundry shop business. The said land is one of those properties. It was registered in the name of the siblings' mother on 8 October 1962. Rubber trees were cultivated on the said land.

[10] On 11 January 1963, about three months after acquiring the said land, the mother transferred the said land to the appellant. The appellant's contention is that the said land was given to him because he did not receive any salary for five years of work at the sundry shop, ie, between the years 1958 to 1963. The respondent's opposing contention is that the appellant at all times held the said land on trust for all his siblings in equal shares, as their parents did not favour any one sibling over the others.

[11] 14 years later, on 12 March 1977, the mother passed away without leaving a will. The following year, on 7 February 1978, the father passed away, also without leaving a will.

[12] Between the years 1977 to 1982, the proceeds from tapping rubber trees on the said land was shared equally between the siblings. The appellant contended that although he owned the said land, times were hard in those days and he did not have the heart to deprive his siblings of this source of income. All quit rent and other outgoings were met by the appellant.

[13] On 12 July 2013, the respondent filed this action seeking the following reliefs, *inter alia*:

(i) a declaration that the appellant holds the said land on trust for all the siblings;

(ii) an order that the appellant return and transfer the said land in 1/7 portions to each of his siblings or in the case where his sibling is deceased, to the estate of each deceased;

(iii) if the appellant refuses to execute the transfer form, the court registrar shall sign and execute the relevant forms;

(iv) an injunction preventing the appellant, his representative or nominee from selling, transferring, disposing of and/or dealing with the said land until the disposal of this proceedings;

(v) damages for the loss of enjoyment and use of the said land, loss of income and proceeds from the rubber trees on the said land, exemplary damages and aggravated damages;

(vi) Interest and costs.

[14] Out of the seven siblings, four of them (Low Yong Pak @ Yong Pak, Low Yong Piew, Low Yong Lam @ Loh Yong Lem and Low Yong Ching) have passed away. The only surviving siblings are the appellant, the respondent, and another sister, Low Soon Yen.

[15] Low Soon Yen is not a party to this action and at the trial, gave evidence in the appellant's favour, stating that their parents favoured the appellant above their other children. She expressed no interest in claiming her share of the land, stating that if the respondent's claim were to be allowed, the said land can be divided into 1/6 shares. She disclaimed any knowledge of any assurance by her parents that the said land would be divided equally among the siblings because at the material time, she was furthering her studies in Australia.

The Decision Of The High Court

[16] The learned High Court Judge narrowed down the issues for trial to the following:

(a) Whether there was an oral trust made in 1963 that the appellant was to hold the said land on trust for equal division among the seven siblings, including the respondent?

(b) Whether the respondent's claim was barred by limitation/laches?

[17] The High Court, after a full trial, concluded that the said land was held by the appellant on trust for the rest of his siblings. The High Court considered the following facts in reaching his decision:

(a) The revenue from the sundry shop and from the father's land was used to purchase the said land;

(b) The relationship between the family members was good and proceeds derived from the father's land were ploughed back into the family business;

(c) The income from the sundry shop was used for the family's expenses even though not all of the siblings worked at the sundry shop;

A (d) The respondent and the other siblings never raised any dispute in relation to the said land due to the understanding that it was held by the appellant on trust for them;

(e) The tax on the said land was borne by the father until his demise. Thereafter the tax and other expenses were borne by the sundry shop
B business;

(f) The respondent's wife, Kuan Keow (PW3) worked on the said land tapping rubber from before the said land was transferred to the appellant, until the 1980s when she stopped working to care for her
C grandchildren. The learned judge accepted the respondent's contention that since the appellant did not object to PW3 working on the said land, he knew that the said land was not meant to belong to him alone;

(g) It was the appellant who in 1983 requested his siblings to allow him to work the said land;

D (h) The learned judge accepted the evidence of the respondent that the reason why this claim was made so late, 50 years after the land was transferred to the appellant, was because the respondent believed that the said land was held on trust.

E **The Appellant's Submissions**

[18] In this court, learned counsel for the appellant submitted that the learned trial judge had misdirected herself when she concluded that Low Tin Yong @ Low Yong Lian (DW1) and Low Soon Yen (DW2) were not credible witnesses when they testified that the division of their mother's
F estate was complete. This was because there was still another dispute comprising the subject matter of adjudication in 22 NCVC-411-05-2013 suit in the High Court pending determination ('the 411 suit') where the respondent and his siblings were making claim to an equal proportion of two pieces of land that were transferred to Low Yong Ching when the mother was
G gravely ill and unconscious. As such, the learned judge concluded that these two witnesses were not witnesses of truth.

[19] However, the appellant maintains that the trial judge erred in her conclusion because these two witnesses testified truthfully that their mother had not left any will because she disposed of all of her property during her
H lifetime. This is a fact. The respondent himself accepted that his late mother had distributed all assets registered in her name prior to her death.

[20] The 411 suit was filed by the respondent against the estate of Low Yong Ching because the respondent disputed the transfer made by the mother to the said Low Yong Ching during her lifetime. The grounds for such
I dispute was that the transfer were effected fraudulently. Alternatively, it was contended that a trust exists in respect of these two pieces of land in favour of the siblings collectively.

[21] It is pertinent that the 411 suit was dismissed. A

[22] Given the real fact scenario, it followed that the two witnesses, DW1 and DW2 were not untruthful. Accordingly, the finding of the trial judge that they were not credible witnesses was made on a flawed basis. Therefore it was submitted that the finding of fact on the credibility of these two witnesses was erroneous. B

[23] Secondly, the learned judge in her judgment concluded that the proceeds or income from the sundry shop was treated as the income of the family notwithstanding that not all the siblings worked in the shop. This too it was contended is an erroneous misapprehension of the facts because the income from the shop belonged solely to the father. The respondent admitted that he was paid a monthly salary for working in the shop. C

[24] The appellant's counsel contended that the learned judge's analogy equating the distribution of the mother's assets to the father's assets cannot be sustained. The father passed away without a will so his assets were equally distributed but in the mother's case, this could not be done as she had distributed all her assets during her lifetime. This was another mistake in the judicial appreciation of the fundamental facts of the case. D

[25] Thirdly, the learned judge inferred that it was the intention of the late father and mother to distribute the assets equally between their children. The basis for the learned judge's inference was that the estate of the late father was distributed equally amongst the children. However in so concluding, she failed to consider or give any weight to the fact that the late father passed away without a will, as a consequence of which distribution was effected in accordance with the Distribution Act 1958. As for the late mother, as pointed out above, she distributed all her assets prior to her death as she saw fit. Given these events, the learned trial judge's inference or conclusion that the parents intended to divide their assets equally between the children is flawed. E F

[26] The learned trial judge misdirected herself in law on the standard of proof to be applied in relation to establishing the existence of a trust. She had applied the standard of a 'balance of probabilities' when in fact it should have been the higher standard of 'beyond reasonable doubt' (see *Choong Kwee Sang v. Choong Kwee Keong* [2008] 5 CLJ 229; [2009] 1 MLJ 186 at 201). G

[27] Consequentially, it was submitted for the appellant that there was insufficient evidential basis for the trial judge to conclude beyond reasonable doubt, that the appellant held the said land on trust for the entire family rather than for himself. In this context, reference was made to the fact that title was registered solely in the appellant's name which confers indefeasibility. There is no endorsement on the title of the word 'trustee' in relation to the appellant. Neither does the memorandum of transfer indicate that such a trust exists. H I

[28] Finally, there is no trust deed to establish that the property is held on trust for the siblings. It was submitted that it was simply insufficient to contend that a declaration of trust subsisted. Something more in the nature of written documentation was necessary to supplement such an oral contention. The lack of subsistence of a trust is further corroborated by the fact that not one sibling lodged a caveat to protect any such alleged trust. A caveat was finally only lodged in 2013.

[29] The only evidence adduced by the respondent to establish a trust was the oral evidence of the wife of one of the siblings, the wife of the respondent, the son of Low Yong Piew and the respondent himself. Their contentions were oral. It is evident that most of the witnesses were aligned to the respondent and their evidence ought to have been treated with caution, as being self-serving.

[30] The appellant contended that the fundamental requirements for the setting up of a trust, namely certainty of words, certainty of subject and certainty of object were not made out. None of the witnesses was able to restate or repeat the precise words uttered by their mother when creating this purported trust.

[31] The learned judge, it was submitted, failed to accord sufficient or proper weight to the evidence of the appellant through the other sole living sibling, one Low Soon Yen who testified that the said land was a gift from their mother to the appellant as he had worked in the sundry shop without salary for many years.

[32] There was inordinate delay under the doctrine of laches in instituting the case after a time lapse of 50 years. In this context, it was contended that the learned judge erred in concluding that there was only a 15 year delay and not 50 years, and that this did not prejudice the respondent's claim. The primary basis for the learned judge's finding of a trust is the fact of a sharing of the income from the land. However on a proper consideration of the evidence, it is clear that income from the land was only shared up to 1983 and not 1998 as found by the learned judge. This was because PW2 gave contradictory evidence which was not corroborated by PW1 or PW3. As such, there was a delay from at least 1983 to 2013, which is a period of 30 years. No satisfactory explanation was put forward and therefore equitable laches applies.

[33] Even if s. 29 of the Limitation Act 1953 is applied, s. 32 of the same Act expressly provides that relief may be refused on the grounds of laches. The delay in instituting this case warrants a finding of laches.

[34] Given the testimony and the factual matrix of this case, it was submitted that the learned judge erred in concluding that a trust subsisted in respect of the land in favour of the respondent and the other siblings.

The Respondent's Submissions

[35] For the respondent, it was submitted that the factual and evidential matrix clearly established the existence of a trust in favour of the siblings. The respondent testified that a trust subsisted because several of the siblings had worked in the sundry shop with the late father from the 1950s to the 1960s. The respondent stated that as a result of all their hard work in the grocery shop, the late father then purchased some properties and registered them in the late mother's name. This included the said land. In this context, the respondent points to the fact that it is undisputed that it is the late father who paid for the land.

[36] The respondent maintained that the determination of the trial judge was correct in fact and in law and was borne out by the fact that the revenue derived from the rubber plantation on the said land was divided equally amongst all the siblings. This is consonant with the distribution of the father's estate that was an equal distribution amongst the siblings.

[37] The learned judge had correctly concluded that in view of the good family relationship between the family members plus the cumulative contribution from the family members, that it was the intention all along that the said land should be held in trust for all the siblings.

[38] The respondent further testified that during his parents' lifetime he and his wife were informed of the existence of such a trust in favour of the seven siblings. It was as a consequence of this understanding that none of the siblings raised a claim to the land until 2013.

[39] The tax on the said land was paid by the respondent's late father until his demise in the year 1982, after which such expenses were borne from the grocery shop's income.

[40] Additionally, the respondent's wife worked on the said land tapping rubber prior to the transfer of the land to the appellant. The appellant did not object to this. If indeed the land belonged solely to the appellant, he would not have allowed PW-3 to work on the said land.

[41] On the law relating to trust, reliance was placed on the Federal Court decision in *Wan Naimah v. Wan Mohamad Nawawi* [1972] 1 LNS 164; [1974] 1 MLJ 41 to contend that a trust need not be in writing. It could be inferred from the conduct of parties, particularly a constructive trust.

[42] As for laches, the respondent contended that there is no specific limitation period when it comes to the recovery of trust property.

[43] In closing, it was pointed out that this claim had been determined on a finding of fact by the learned High Court Judge on a reasoned basis and that this court ought to be slow to reverse such a finding.

A **The Decision Of This Court**

[44] As stated at the outset, we reversed the finding of the trial judge. In doing so we were mindful of the trite but oft stated principle that an appellate court will be slow to overturn the decision of a High Court Judge, particularly after the trial of a suit, where the latter has enjoyed the audio visual advantage of seeing and hearing witnesses first hand.

[45] We were further mindful of the principle that a finding of fact by a trial judge, when based on the credibility of a witness, may only be set aside upon appeal where incontrovertible facts or uncontested testimony demonstrate that the judge's conclusions are erroneous. This was a case where we concluded that the decision at trial was highly improbable or contrary to reasonable inferences to be drawn from the evidence on record.

[46] The appellate courts are ever vigilant to ensure that first tier decisions are not reversed simply on the grounds that the appellate court would have arrived at a different decision, but because no reasonable trier of fact would have arrived at such a conclusion based on the evidence before it. It bears repeating that an appellate court should and will intervene in circumstances where there are errors of law or where there is a lack of judicial appreciation of the evidence on record, giving rise in turn to an erroneous conclusion in law (see *Thomas v. Thomas* [1947] AC 484, *Clarke v. Edinburgh and District Tramways Co Ltd* [1919] SC (HL) 35, *Yuill v. Yuill* [1945] P 15, *McGraddie v. McGraddie And Another* [2013] UKSC 58, *Anderson v. City of Bessemer* (1985) 470 US 564, *Henderson v. Foxworth Investments Limited* [2014] UKSC 41, *Carlyle v. Royal Bank of Scotland plc* [2015] UKSC 13, *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119; [1979] 2 MLJ 229, *Merita Merchant Bank Singapore Ltd v. Dewan Bahasa dan Pustaka* [2014] 9 CLJ 1064, *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309, *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453, *Conlay Construction Sdn Bhd v. Perembun (M) Sdn Bhd* [2013] 9 CLJ 828).

[47] This however was a case where we were satisfied that the findings of the learned trial judge, with respect, were clearly erroneous. While there was some evidence to support the finding of a trust by the trial judge, a consideration of the entire evidence on the record left us with the definite and firm conviction that a mistake had been committed. It bears repeating that we remained cognizant that generally speaking, when a conclusion or result is dependent upon the candor and credibility of the witnesses, such a finding is best left to the trial judge who accordingly is accorded great weight in the appellate court.

[48] However in the instant case, the following clear errors of fact and law as detailed below persuaded us that this was a fit case for appellate intervention:

(i) we were satisfied that the learned judge misdirected herself when she dismissed DW1 and DW2 as untruthful witnesses on the basis of an erroneous misapprehension of the evidence. As outlined above, the learned judge rejected DW1 and DW2 as credible witnesses on the grounds that they testified that their mother distributed her estate or assets during her lifetime. In other words, they testified that the distribution of their mother's estate was complete. However on the basis of the existence of the 411 suit in the High Court at Shah Alam where the respondent and his siblings were seeking the transfer of two pieces of land that had been transferred to one of the siblings, namely Low Yong Ching while the late mother was seriously ill and unconscious, the learned trial judge concluded that the testimony of DW1 and DW2 was incorrect.

In so concluding, the learned judge failed to comprehend that these facts establish that the mother had in fact distributed all her assets in her lifetime. The fact that the respondent and the other siblings were contesting the transfer of the land by the late mother to individual sibling, does not detract from the fact that the late mother had effected these transfers during her lifetime, leaving nothing to be distributed upon her death. The challenge mounted by the respondent and the other siblings does not mean that there was no distribution of the mother's estate. On the contrary, it was these very transfers effected during the late mother's lifetime that establish that there was a complete distribution of the mother's estate. As such, the learned judge's finding that DW1 and DW2 were untruthful witnesses is premised on a clearly erroneous comprehension of the basic facts of the case. This warrants correction.

The fact of the error is further borne out by a consideration of the respondent's own evidence where he confirmed that there were no further assets in his mother's name at the point of her demise. As such, there can be no question of any distribution of her assets subsequent to her death.

As a result of this misapprehension of this fundamental fact, the learned judge erroneously concluded that DW1 and DW2 were less than credible, when they were in fact stating an undisputed fact. This erroneous inference resulted in the wrongful rejection of the entirety of their evidence. With the wrongful rejection of DW1 and DW2's evidence *in toto,* the learned trial judge failed to evaluate properly or at all the relevant weight to be accorded to their evidence in relation to the history of the purchase of the said land and the late mother's intention to give the said land to the appellant for his contribution to the growth of the sundry shop business.

(ii) again, a similar misapprehension of the facts was made in relation to the income from the sundry shop. The learned judge concluded that the income from the shop was that of the family, rather than the father

himself who was the sole proprietor of the shop. The respondent admitted that he was paid a monthly salary while working in the sundry shop. As such, the income of the shop was not held at all times for the benefit of all the members of the family but owned by the father who could therefore dispose of the same as he saw fit. By concluding erroneously that the income from the shop was for the benefit of the family, the learned judge went on to make the inference that the said land which was purchased from the proceeds of the sundry shop, was therefore held in trust for the family. The inference is based on a flawed comprehension of the facts, and is therefore also erroneous. As such, the learned trial judge in determining that a trust existed on this basis, erred in fact and in law in so concluding.

(iii) the learned trial judge also erroneously considered that the late father and mother of the parties fully intended to divide their property amongst the siblings on the grounds that the late father had divided his estate equally between his children. However, the trial judge misdirected herself in so concluding because she failed to realise that the late father passed away in an accident without a will, as a consequence of which his estate was distributed in accordance with the provisions of the Distribution Act 1958. As such, it cannot reasonably be concluded that the late father had acted to distribute his property between his children equally. And therefore, the inference that the parents wished to divide their property equally between the siblings is also not made out. The error is even greater in relation to the mother who distributed her assets during her lifetime to certain siblings only.

(iv) in relation to the law, the learned judge misdirected herself on the standard of proof to be applied when determining whether or not a trust subsisted on the given factual matrix. The learned judge applied the standard of a 'balance of probabilities' rather than 'beyond reasonable doubt'. It would appear that in so doing, the learned judge, with respect, erred in law. In so concluding, we are supported by the decision of this court in *Choong Kwee Sang v. Choong Kwee Keong* [2008] 5 CLJ 229; [2009] 1 MLJ 186 at 246 (CLJ); 201 (MLJ):

> … In the instant case the appellant had not only failed to dislodge the burden of having to prove he paid for the subject properties, he had also failed the additional burden of proving the deceased held them in trust for him.
>
> The burden is a heavy one as Lord Chancellor in *Po Kin & Anor v. Po Shein* AIR 1926 PC 77 said:
>
> … the person who alleges that property conveyed to another belongs to him must prove his allegation and prove it beyond reasonable doubt …
>
> The onus being such, I am unable to see how the appellant's case, based on the evidence adduced by him as it were, can hold up to scrutiny.

> ... The standard required to prove a trust property is beyond reasonable doubt. There is no document suggesting the slightest probability of the existence of a trust. There was also no independent witness called to give evidence in support of such alleged trust.

The cases of *Low Yong Thuan v. Low Mey Yoon & Ors & Another Appeal* [2015] 1 LNS 271 and *Hameeda Bee v. Mrs P Seenivasagam* [1950] 1 LNS 22; [1950] 16 MLJ 267 similarly make reference to *Po Kin & Anor v. Po Shein (supra)* and applied the standard of proof of 'beyond reasonable doubt'.

[49] We therefore concluded that the learned judge had erred in applying a lower standard of proof in determining whether or not a trust subsisted on the factual matrix of this case.

[50] As stated at the outset, even if the lower standard were applied, we were of the view that the threshold was not met to warrant an inference that a trust subsisted on a consideration of the totality of the evidence. We were clear that if the evidence as a whole had been evaluated fully and cumulatively, the only tenable result or determination that would ensue would be that no such trust subsisted in favour of the siblings as a whole.

[51] Firstly, there is nothing on the title or the memorandum of transfer to bear out the existence of such a trust. Section 344 of the National Land Code (NLC) provides for the registration of any trust created in the memorial of registration. In short, the title does not reflect that the appellant holds the said land on trust as a trustee. There is no endorsement with the word 'trustee' on the title deed to the said land to evidence the existence of a valid trust in favour of the siblings.

[52] There is no written document or trust deed to support the existence of a trust. Neither was there any attempt by the respondent or his other siblings to protect their alleged interest in the land by the entry of a caveat until 2013, some 50 years after the transfer of the land to the appellant. It is inconceivable that there would be no claim to the property during the entirety of this period, if indeed such a trust subsisted. The indefeasibility of title enjoyed by the appellant ought not to be undermined by the mere suggestion, some 50 years later, of the nebulous existence of a trust (see *Yong Wee Ming v. Chin Thian Guan* [1983] 2 CLJ 210; [1983] CLJ (Rep) 438; (1984) 1 MLJ 236).

[53] The trial judge failed, in our view to scrutinise the evidence of the respondent and his witnesses with sufficient attention or evaluation in that she failed to apprehend that these witnesses were all closely aligned to the respondent and had pecuniary interest in the matter. To that extent, their evidence was relatively self-serving. No independent witnesses were called to corroborate or support the evidence of their witnesses. It was not supported by any documentary evidence whatsoever.

[54] In determining whether or not a trust subsisted in law, the learned judge failed to consider, or consider in any detail, whether the three essentials of a valid trust were in fact established on the present factual matrix, namely:

(a) Certainty of words;

(b) Certainty of subject; and

(c) Certainty of object.

(see *Yeong Ah Chee @ Yan Hon Wah v. Lee Chong Hai & Anor And 13 Other Appeals* [1994] 3 CLJ 20 per Peh Swee Ching SCJ).

[55] In this context the onus was on the respondent, as plaintiff, to establish that the late mother had uttered clear, unequivocal and irrevocable words to the appellant and his siblings for the purposes of creating a trust on the said land. None of the witnesses was able to testify the words uttered by the late mother to create such a trust, as it were. This fundamental first limb for the creation of a trust was therefore not satisfied.

[56] More pertinently perhaps, the learned trial judge failed to give any or any reasonable consideration to the evidence of the only other living sibling, Low Soon Yen (DW2), who testified that the said land was a gift to the appellant from her parents. This was because the appellant had worked in the sundry shop without pay from the age of 16. DW2 also testified that the late mother had not stated during her lifetime that the said land was held in trust for all the siblings. The learned judge made no mention of this salient evidence. Having erroneously dismissed the entirety of this witness's evidence on the grounds that she had stated that the mother's estate was distributed in her lifetime, she failed to evaluate this crucial evidence.

[57] We also concur with the submissions of learned counsel for the appellant that if indeed the said land was for the benefit of the siblings and held on trust as such by the appellant, then there would have been no necessity to transfer the land to the appellant in 1963 as the late mother could simply have held it on trust for all her children.

[58] Furthermore, the fact that the land was transferred to the appellant some three months after the mother was given the land by the father in 1963, coupled with the fact that there was no transfer of any kind after that date, supports the conclusion that the transfer was in fact a direct gift from the mother to the appellant.

[59] In determining this crucial issue of whether or not a trust subsisted, the learned judge should have considered and applied the *dicta* in the Federal Court case of *Yong Nyee Fan & Sons Sdn Bhd v. Kim Guan & Co Sdn Bhd* [1978] 1 LNS 244; [1979] 1 MLJ 182 at 193:

> ... Evidence contemporaneous with the transaction, or shortly before and shortly afterwards, must be seen to be much more important than the evidence of events after the death of the person who was alleged to have constituted himself the trustee.

> All the documentary evidence form the absence of any mention in Kim Guan & Co and from the positive assertions in Yong & Co was against a trust. The only evidence for it was the oral testimony of Yap and Tan and this evidence has, on the authorities above quoted, to be treated with suspicion and to be set against all the other evidence.
>
> ... Refuge behind the screen of faith in the integrity of Yong Nyee Fan which Yap and Tan advanced as the reason why the contemporary written records were so strangely and so completely silent on any matter of trust or even interest in the house and which prevailed so persuasively with the judge, must, even on the ordinary judicial assessment of evidence, fail to establish a trust where none was anywhere else shown to exist.
>
> Where, as here, the contemporary records were not shown to be other than correctly written up in the ordinary course of business, they must be preferred to the oral evidence of witnesses with an interest of their own to serve, more particularly so where the oral testimony was in itself so clearly inconsistent and unreasonable.

[60] In the instant case, the learned trial judge failed to consider adequately or at all, the contemporaneous conduct of the parties, the lack of any written documentation to support the existence of a trust, as well as the evidence of salient witnesses. Instead, she relied on the oral testimony of the respondent and his immediate family, without weighing up their self-interest in the matter. Their evidence moreover was not consonant with the contemporaneous evidence.

[61] Learned counsel of the respondent relied on the case of *Tneu Beh v. Tanjong Kelapa Sawit Sdn Bhd & 3 Ors* [1995] 1 CLJ 741 to support his proposition that an implied trust subsisted on the facts. However, *Tneu*'s case (above) is distinguishable on the facts as the evidence in that case to establish the existence of an implied trust was overwhelming. The evidence there disclosed that the family fund was the result of the collective contribution of the siblings. They had acted as partners in so far as the family business was concerned. There was no bickering amongst them. On this basis, the court there concluded on the consideration of the entirety of the evidence that an implied trust subsisted on the facts of that case, such that the registered owners of the various properties held them in trust for the family.

[62] However, none of these features is evident in this case. In our present case, the evidence shows that the property was purchased by the father alone. Further, not all but only three of the siblings worked in the business. The facts of the present case do not lend themselves to the inference of any kind of implied trust.

[63] Finally but significantly, the learned judge failed to consider that there was an inordinate delay under the doctrine of laches in the institution of this claim. The time delay is 50 years rather than the 15 years as held by the learned judge. Even if the fact of the distribution of income from the land is considered, together with the fact that the respondent's wife worked on the

land to tap rubber in the 1980s is accorded consideration, this would still mean that time would run at the latest from 1983 (to 2013), which is 30 years.

[64] No cogent explanation has been put forward to explain this delay, save that the parties were all on good terms and it was assumed that the land was held on trust for all the siblings.

[65] In *Alfred Templeton & Ors v Mount Pleasure Corp Sdn Bhd* [1989] 1 CLJ 693; [1989] 1 CLJ (Rep) 219 at 276, laches is defined as follows:

> ... Laches is an equitable defence implying lapse of time and delay in prosecuting a claim. A Court of Equity refuses its aid to a stale demand where the plaintiff has slept upon his rights and acquiesced for a great length of time. He is then said to be barred by laches. In determining whether there has been such delay as to amount to laches the Court considers whether there has been acquiescence on the plaintiff's part and any change of position that has occurred on the part of the defendant. The doctrine of laches rests on the consideration that it is unjust to give a plaintiff a remedy where he has by his conduct done that which might fairly be regarded as equivalent to a waiver of it or where by his conduct and neglect he has, though not waiving the remedy, put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted. (*Halsbury's Laws of England* 3rd Edn Vol 14 p 641 paras 1181, 1182). Laches has been succinctly described as 'inaction with one's eyes open'.

(See also *Gan Hock Soon v Gan Hock Soon & Other* [2012] 1 LNS 726 where the claim was struck out on the grounds of laches after a delay of 23 years from the date of the distribution order. Reference was made to the case of *M Ratnavale v. Loudenadin* (1988) 1 CLJ 168 where it was held, *inter alia* that "... A court of equity aids the vigilant and not the indolent.")

[66] Given the untenable delay of 50 years in the instant case, during which the respondent and the siblings did nothing to assert their alleged interest in the said land, this was a fit and proper case for the learned judge to conclude that laches defeated the respondent's claim. In our view the learned trial judge, with respect, was clearly wrong in failing to so conclude.

Conclusion

[67] In all these circumstances we were satisfied that this was a fit and proper case for appellate intervention. Accordingly the appeal was allowed. The decision of the High Court was set aside and the respondent's claim dismissed.

[68] Finally, we granted the appellant costs of RM30,000 for the proceedings here and below. The deposit was refunded to the appellant.